

**A Ranhill Worley Sdn Bhd (formerly known
 as Jacobs Construction Management (M) Sdn Bhd) v
 Franz Jozef Marie Schefman & Anor**

**B HIGH COURT (KUALA LUMPUR) — JUDICIAL REVIEW NO
 R1–25–273 OF 2004
 LAU BEE LAN J
 13 SEPTEMBER 2008**

**C *Labour Law — Industrial Court — Award — Judicial review of — Whether*
High Court should grant certiorari to quash Industrial Court award — Whether
Industrial Court had erred in law in awarding claimant backwages for unexpired
**D *period of first respondent's fixed term contract even though he was an expatriate*
with valid work permit that had expired — Whether there had been breach of
procedural unfairness — Whether Industrial Court had erred in denying
*adjournment to enable applicant's material witness to attend court*****

**E The first respondent was employed by a company known as Stork Comprimo
 (M) Sdn Bhd ('Stork Malaysia') for a period of five years. The applicant had
 acquired Stork Malaysia through the global acquisition of Stork NV Holland.
**F Following the acquisition, the first respondent received a letter dated
 16 February 2000 from the applicant wherein it expressed an intention to
 accept the first respondent into their employment upon the terms and
 conditions contained in the first respondent's employment agreement with
 Stork Malaysia. Thereafter vide a letter dated 27 February 2001, the applicant
 had informed the first respondent that effective from 1 January 2001, the first
**G respondent's new salary was fixed at RM24,193 per month. Thereafter on
 11 May 2001 the first respondent received a 4-month notice of termination
 informing him that he would be demobilised from work and citing 'lack of
 work and reduction in workload' as the reason for the termination. The first
 respondent disputed this reason and alleged instead that it was never
**H indicated to him that his work was becoming or would become redundant
 but on the contrary was praised for his services which resulted in a more than
 30% salary increase. The first respondent also sought reinstatement without
 any loss whatsoever but the applicant said that they were unable to accede to
 the request for reinstatement. This dispute pertaining to the dismissal of the
**I first respondent by the applicant was then referred to the Industrial Court. At
 the conclusion of the hearing, the Industrial Court found that the applicant
 had failed to prove on a balance of probabilities that the first respondent was
 redundant and that his termination was without just cause and excuse. The
 court therefore ordered the applicant to pay the first respondent the sum of**********

RM534,665.30 free of tax within 60 days of the award, having found that reinstatement was not an appropriate remedy. This was an appeal by the applicant against that award. By an application for judicial review of the Industrial Court's decision the applicant sought an order for certiorari under O 53 of the Rules of the High Court 1980 to quash the award. The applicant challenged the decision of the Industrial Court on the grounds that the Industrial Court had erred in law in awarding the claimant backwages for the unexpired period of his fixed term contract, which was for 34 months, even though the first respondent was an expatriate with a valid work permit that had expired on 26 September 2001. The second ground of challenge was that the Industrial Court had erred in law for not calling one Curtis Landry from Canada ('the material witness') to give evidence for the applicant. The applicant submitted that the crux of the applicant's application for judicial review was that the applicant was not given the opportunity to produce a material witness whose role in the termination of the first respondent's services was crucial and that if the applicant succeeded on this ground the first ground did not even arise. The evidence adduced showed that having called four witnesses, the applicant sought an adjournment to enable the material witness to attend court. Although the court had granted an adjournment on a prior occasion for such a reason, the court refused to allow any future adjournments for the same reason. As a result of this refusal the applicant contended that there was a lack of opportunity for the applicant to present their case through the material witness and that this amounted to a breach of natural justice. The first respondent submitted that the Industrial Court had taken into account all the relevant facts in deciding not to grant the postponement because there was not even a letter from the material witness to explain why he could not attend court on the date in question. As such the first respondent contended that the applicant was not restricted from presenting its case. The issue for consideration by this court was whether on the factual matrix of this case there had been any breach of procedural fairness as contended by the applicant.

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Held, dismissing the application with cost:

- (1) The applicant had due notice that the first respondent had objected vehemently to the applicant's application for the evidence of the material witness to be heard on a later date. In addition, the applicant also had due notice from the court as to its position vis-à-vis their application to have the testimony of the material witness recorded on a later date. Despite this they were seeking yet another adjournment at the eleventh hour 'because of unforeseeable circumstances'. In the circumstances the chairman of the Industrial Court had acted fairly. Thus, the grounds upon which the second ground of challenge was premised, ie that the applicant was not given the opportunity to

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- A produce a material witness whose role was crucial to their case, cannot be sustained. Therefore, the Industrial Court had not erred in law or acted in excess of its jurisdiction (see paras 4.1 & 8.7).
- (2) There is a consistent trend of cases which decided that an expatriate who had been unfairly dismissed was awarded backwages for the unexpired period of his fixed term contract. If reinstatement was awarded then it would entail payment of backwages from the date of dismissal till date of reinstatement which would far exceed the amount of backwages payable to the expatriate who is normally engaged on a fixed term contract. In the present case it was only reasonable that the first respondent be awarded backwages for the remainder of the unexpired term of his fixed term contract, which was what the chairman of the Industrial Court did. Hence there was no error of law on the part of the Industrial Court or of it acting in excess of its jurisdiction (see paras 11–12).
- (3) In addition the chairman in the present case held reinstatement was inappropriate because the first respondent had since his termination found fresh employment and based on the applicant's evidence there was no position open that fit the first respondent's job title. Thus, the order of reinstatement was not an issue linked to work permit. In any case the issue as to whether the first respondent had a valid work permit or not was irrelevant (see para 11.2).

F **[Bahasa Malaysia summary]**

- Responden pertama telah diambil bekerja oleh sebuah syarikat dikenali sebagai Stork Comprimo (M) Sdn Bhd ('Stork Malaysia') untuk tempoh lima tahun. Pemohon telah memperoleh Stork Malaysia melalui pemerolehan global Stork NV Holland. Berikutan pemerolehan, responden pertama telah menerima surat bertarikh 16 Februari 2000 daripada pemohon di mana ia menyatakan niat untuk menerima responden pertama ke dalam pekerjaan mereka atas terma dan syarat yang terkandung dalam perjanjian pekerjaan responden pertama dengan Stork Malaysia. Berikutan surat bertarikh 27 Februari 2001, pemohon telah memaklumkan responden pertama bahawa berkuat kuasa daripada 1 Januari 2001, gaji baru responden pertama ditetapkan pada RM24,193 sebulan. Selepas itu pada 11 Mei 2001 responden pertama telah menerima notis penamatan 4 bulan memaklukkannya bahawa dia akan diberhentikan daripada kerja dan memberikan 'lack of work and reduction in workload' sebagai sebab penamatan tersebut. Responden pertama telah mempertikaikan alasan ini dan mengatakan sebaliknya bahawa ia tidak pernah menggambarkan kepadanya bahawa kerjanya akan menjadi atau menjadi tidak diperlukan tetapi sebaliknya memuji perkhidmatannya yang menyebabkan lebih

daripada 30% tambahan gaji. Responden pertama juga memohon pengembalian kedudukan jawatan tanpa apa-apa kerugian tetapi pemohon berkata bahawa ia tidak boleh bersetuju dengan permintaan untuk pengembalian kedudukan jawatan. Pertikaian ini yang berkaitan pemecatan responden pertama oleh pemohon kemudiannya telah dirujuk kepada Mahkamah Perusahaan. Di akhir pendengaran, Mahkamah Perusahaan mendapati bahawa pemohon telah gagal membuktikan atas imbalan kebarangkalian bahawa responden pertama tidak diperlukan dan bahawa penamatannya adalah tanpa sebab dan alasan yang adil. Mahkamah oleh itu memerintahkan pemohon membayar responden pertama sejumlah RM534,665.30 bebas cukai dalam tempoh 60 hari daripada award, dengan mendapati yang pengembalian kedudukan jawatan bukan remedi yang sesuai. Ini adalah rayuan oleh pemohon terhadap award tersebut. Melalui satu permohonan untuk semakan kehakiman keputusan Mahkamah Perusahaan pemohon memohon perintah certiorari di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 untuk membatalkan award. Pemohon mencabar keputusan Mahkamah Perusahaan atas alasan bahawa Mahkamah Perusahaan terkhilaf di sisi undang-undang dalam mengawardkan penuntut tunggakan gaji untuk tempoh tak luput kontrak tempoh tetapnya, iaitu untuk 34 bulan, meskipun responden pertama adalah ekspatriat dengan permit kerja sah yang telah luput pada 26 September 2001. Alasan kedua cabaran adalah bahawa Mahkamah Perusahaan terkhilaf di sisi undang-undang kerana tidak memanggil Curtis Landry daripada Canada ('saksi utama') untuk memberikan keterangan bagi pihak pemohon. Pemohon menghujahkan bahawa pokok permohonan pemohon untuk semakan kehakiman adalah bahawa pemohon tidak diberikan peluang untuk mengemukakan saksi utama yang berperanan dalam penamatan khidmat responden pertama adalah penting dan jika pemohon berjaya atas alasan ini maka alasan pertama tidak timbul langsung. Keterangan yang dikemukakan menunjukkan bahawa setelah memanggil empat saksi, pemohon memohon penangguhan untuk membolehkan saksi utama hadir ke mahkamah. Meskipun mahkamah memberikan penangguhan sebelumnya untuk alasan sedemikian, mahkamah telah enggan membenarkan apa-apa penangguhan di masa depan untuk alasan sama. Akibat keengganan ini pemohon menegaskan bahawa tiada peluang untuknya mengemukakan kesnya melalui saksi utama dan ini membentuk pelanggaran keadilan asasi. Responden pertama berhujah Mahkamah Perusahaan telah mengambil kira semua faktor relevan dalam memutuskan tidak membenarkan penangguhan kerana tidak ada surat langsung daripada saksi utama yang menjelaskan kenapa dia tidak dapat hadir ke mahkamah pada tarikh yang dipersoalkan. Oleh itu responden pertama menegaskan bahawa pemohon tidak terhalang daripada mengemukakan kesnya. Isu untuk dipertimbangkan oleh mahkamah ini adalah sama ada berdasarkan faktual matriks kes ini terdapat pelanggaran keadilan prosedur seperti yang ditegaskan oleh pemohon.

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- A** **Diputuskan,** menolak permohonan dengan kos:
- (1) Pemohon telah diberikan notis sewajarnya bahawa responden pertama telah membantah bersungguh-sungguh terhadap permohonan pemohon agar keterangan saksi utama didengar pada tarikh lain.
- B** Tambahan pula, pemohon juga telah mendapat notis sewajarnya daripada mahkamah berkaitan kedudukan permohonan mereka untuk direkodkan testimoni saksi utama pada hari lain. Meskipun ini berlaku mereka telah memohon penangguhan lain lagi di saat akhir 'because of unforeseeable circumstances'. Dalam keadaan sedemikian pengarah
- C** Mahkamah Perusahaan telah bertindak dengan adil. Oleh itu, alasan-alasan yang mana alasan kedua dicabar berasaskan adalah bahawa pemohon tidak diberikan peluang untuk mengemukakan saksi utama yang berperanan penting dalam kes mereka, tidak boleh dikekalkan.
- D** Oleh itu, Mahkamah Perusahaan tidak terkhilaf dari segi undang-undang atau bertindak melampaui bidang kuasanya (lihat perenggan 4.1 & 8.7).
- (2) Ini merupakan arah aliran konsisten kes-kes yang memutuskan bahawa expatriat yang dipecat secara tidak adil yang diawardkan tunggakan gaji untuk tempoh tidak luput kontrak tempoh tetapnya. Jika pengembalian kedudukan jawatan diawardkan maka ini akan menyebabkan bayaran tunggakan gaji dari tarikh pemecatan hingga
- E** tarikh pengembalian kedudukan jawatan yang melebihi jumlah tunggakan gaji yang perlu dibayar kepada expatriat yang biasanya dilantik untuk kontrak tempoh tetap. Dalam kes ini adalah munasabah untuk responden pertama diawardkan tunggakan gaji untuk baki tempoh tak luput kontrak tempoh tetapnya, yang mana pengerusi
- F** Mahkamah Perusahaan lakukan. Justeru itu tiada kesilapan undang-undang di pihak Mahkamah Perusahaan mahupun ia bertindak melampaui bidang kuasanya (lihat perenggan 11–12).
- G** (3) Tambahan pengerusi dalam kes ini memutuskan yang pengembalian kedudukan jawatan adalah tidak sesuai kerana responden pertama sejak dipecat telah mendapat pekerjaan baru dan berdasarkan keterangan pemohon tidak ada jawatan kosong yang sesuai dengan pangkat jawatan responden pertama. Oleh itu, perintah pengembalian kedudukan jawatan bukan isu berkaitan permit pekerjaan. Dalam apa keadaanpun isu sama ada responden pertama mempunyai permit pekerjaan yang sah
- H** atau tidak adalah tidak relevan (lihat perenggan 11.2).]
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Notes

For cases on award of Industrial Court, see 8(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1351–1411.

Cases referred to

- Assunta Hospital v Dr A Dutt* [1981] 1 MLJ 115 (folld)
Man Yau Holdings Bhd v Pakirisamy Karunakaran [2003] 2 ILR 16 (refd)
Matrix Fire System Sdn Bhd v Aziman Shah bin Abdul Samad [1999] 6 MLJ 230 (folld)
Microsoft Malaysia Sdn Bhd v Michael Brian Davis [2002] 2 ILR 453 (refd)
Rohana bte Ariffin & Anor v Universiti Sains Malaysia [1989] 1 MLJ 487 (refd)
Shahpadu Energy & Engineering SB v Stuart Ashley Eban [1999] 1 LNS 196 (folld)
Stamford College v Leslie Dolores Swanson [1997] 1 ILR 152 (refd)
Tyco Engineering & Construction (M) Sdn Bhd v James Francis Trimble & Anor [2005] 7 MLJ 631 (refd)
United Engineers (Malaysia) Bhd v Jurgen HH Dorbecker [1993] 2 ILR 48 (refd)

Legislation referred to

Employment (Restriction) Act 1968 ss 5, 6, 7
 Rules of the High Court 1980 O 53

T Thavalingam (Zaid Ibrahim & Co) for the applicant.
Teh Hong Je (Tan Hwee Hwee with him) (Tan Kin Siong & Teh Hong Jet) for the first respondent.

Lau Bee Lan J:

[1] The applicant has appealed against the decision of the court made on 14 March 2008 wherein I had ruled as follows:

- (1) The court has considered the submissions of both the learned counsel for the applicant and the first respondent. The applicant challenged the Award No 1263 of 2004 dated 30 September 2004 on two grounds:
 - (i) that the Industrial Court had erred in law in awarding the claimant backwages for the unexpired period of his fixed term contract; and
 - (ii) that the Industrial Court has erred in law for not calling Curtis Landry.
- (2) I am of the view that based on the record and the authorities, the Industrial Court has not committed any error of law in respect of the two (2) grounds challenged by the applicant. Thus there is no reason

- A for the court to interfere with the Industrial Court's decision.
Therefore the application of the applicant is dismissed with cost.

- [2] The brief facts of the case for purposes of this appeal are as follows. The
B applicant was formerly known as Jacobs Construction Management (M) Sdn
Bhd (referred to as 'Jacobs' in the award) was joined as a party in this
proceeding by order of court dated 19 March 2003. The first respondent had
entered into an employment agreement (exh RG-1/COE1) for a period of
C five years with Stork Comprimo (M) Sdn Bhd commencing from 1 August
1999 and terminating on 31 July 2004 (or pursuant to part 1 cl 3 of the
further terms and conditions hereto). Pursuant to an acquisition agreement
dated 16 February 2004 entered between Jacobs Engineering Group Inc and
Stork NV, the applicant attempted to sell their business model in Malaysia by
D acquiring Stork Comprimo (M) Sdn Bhd through the global acquisition of
Stork NV Holland. As part of that acquisition, Jacobs Engineering Group
(JEG) acquired Stork's assets and business relationship with Protek
Engineers Sdn Bhd. JEG's principle interest in acquiring Stork was to
strengthen its market position in Northern Europe. The Malaysian operation
was included in the Stork deal and offered JEG an opportunity to explore
E market opportunities in Malaysia. JEG operated in Malaysia through its
wholly owned subsidiary, Jacobs, now the applicant. Following the
acquisition the first respondent received a letter dated 16 February 2000
(p 44, Rosli's affidavit/CL2) whereby JEG expressed an intention to accept
the first respondent into their employment whereby it was stated in the said
F letter that Jacobs shall adopt all the terms and the conditions contained in the
first respondent's employment agreement with Stork Comprimo (M) Sdn
Bhd. It is not disputed that vide a letter dated 27 February 2001 (p 45, Rosli's
affidavit/CL3) Jacobs had informed the first respondent that effective
1 January 2001, the first respondent's new salary was fixed at RM24,193 per
G month. On 11 May 2001 the first respondent received a letter from the
applicant informing him that he would be demobilised from work on even
date by giving him four month's notice of termination (p 46, Rosli's affidavit).
The first respondent replied vide his letter dated 14 May 2001 disputing the
applicant's reason for termination as 'lack of work and reduction in
H workload'. The applicant replied vide letter dated 24 May 2001 (pp 49-50,
Rosli's affidavit), inter alia, alleging that the first respondent's role had become
redundant as they did not require his expertise in the EPC sector. The first
respondent replied vide his letter dated 29 May 2001 stating, inter alia, that
his responsibilities included 'engineering services' besides the EPC sector; that
I it was never indicated to him that his work was becoming or would become
redundant but on the contrary was praised for his services which resulted in
more than 30% salary increase.; he also sought for reinstatement without any
loss whatever (pp 51-53, Rosli's affidavit). The applicant replied vide letter
dated 31 May 2001 stating that they were unable to accede to his request for

reinstatement. Hence the dispute before the Industrial Court pertain to the dismissal of the first respondent by the applicant on 11 May 2001 as stated in the Minister's reference dated 5 June 2002. At the conclusion of the hearing, the Industrial Court found that the applicant had failed to prove on a balance of probabilities that the first respondent was redundant and his termination was without just cause and excuse; and ordered the applicant to pay the first respondent the sum of RM534,665.30 free of tax within 60 days of the award having found that reinstatement is not an appropriate remedy.

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[3] Vide an application for judicial review dated 2 December 2004 the applicant (the company in the Industrial Court proceedings), sought essentially for an order of certiorari under O 53 of the Rules of the High Court 1980 ('the RHC') to quash Award No 1263 of 2004 and handed down by the Industrial Court on 30 September 2004. In addition Encik T Thavalingam, learned counsel for the applicant, relying on prayer (c) of the application in that the court is entitled to order any relief it deems fit, in oral submission had urged the court to also remit the matter to the said Industrial Court chairman to record the evidence of one of the applicant's key witness, one Mr Curtis Landry and subject to cross-examination by learned counsel for the first respondent as the Industrial Court chairman and both counsel for the applicant and the first respondent are still around.

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3.1 The cause papers involved in the applicant's application are:

(i) on the part of the applicant —

- (a) application for judicial review dated 2 December 2004 (encl 1)
- (b) statement pursuant to O 53 r 3(2) of the RHC dated 2 December 2004 (encl 2)
- (c) affidavit of Rosli bin Ab Ghani affirmed on 1 December 2004 ('Rosli's affidavit') (encl 3)
- (d) affidavit (supplementary) affirmed by MS Teofilus Ponniah on 15 February 2005 (encl 11).

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(ii) on the part of the first respondent —

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- (a) the affidavit of the first respondent himself affirmed on 5 January 2006 (encl 12).

[4] The applicant has two main grounds of challenge as deposed in paras 30–36 of Rosli's affidavit and they are:

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- (i) that the Industrial Court had awarded backwages of 34 months from 11 May 2001 to 31 July 2004 even though the claimant is an expatriate with a valid work permit that had expired on 26 September 2001; and

- A (ii) that the Industrial Court did not allow for a postponement for the applicant to call Curtis Landry from Canada.
- B 4.1 In oral submission Mr T Thavalingam stated that the crux of the applicant's application for judicial review was the applicant was not given the opportunity to produce a material witness whose role in the termination of the first respondent's services was crucial; and if he succeeded on this second ground, then the first ground did not arise.
- C [5] As submitted in the applicant's outline submission dated 14 March 2007 (encl 14), the second ground of challenge is as follows:
- D The person who could have shed some light on the real reason for the claimant's termination, Curtis Landry was not called. It is true that after the company had called four witnesses the company sought an adjournment to enable the said Curtis Landry to attend court. However, in light of the fact that the court had granted an adjournment to the company on a prior occasion for just such a reason and the case has been pending since 2002, the court has refused to allow any further adjournments (p 27 of the award; p 516 of Rosli's affidavit).
- E 5.1 It was thereby submitted the learned chairman of the Industrial Court erred in law and acted in excess of its jurisdiction when:
- F (a) It failed to act in accordance with equity and the general policy and scheme of the Industrial Relations Act 1967 when it failed to allow the applicant's application for an adjournment to enable the applicant to secure the attendance of Curtis Landry, a foreigner who resides in Canada. Curtis Landry is one of the key witnesses who would have been able to give evidence on the facts and reasons the first respondent's services were terminated on 11 May 2001;
- G (b) it failed to take into account the relevant factor that the first application for an adjournment of the trial was due to the difficulties in securing the attendance of the witnesses from Singapore and Canada vide letter dated 20 May 2003 and the same was due to circumstances and events that were unpredictable and beyond the control of the parties. The same was due to the outbreak of SARS ('Severe Acute Respiratory Syndrome') at that point of time.
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- I [6] The first respondent opposed basically submitting that:
- (i) the learned chairman of the Industrial Court had taken into account all the relevant facts and had rightly exercised her discretion before deciding not to grant the postponement; and

- (ii) the learned chairman of the Industrial Court did not restrict the applicant from presenting their case. A

[7] In support of their contention that the lack of opportunity for the applicant to present their case through Curtis Landry was a breach of natural justice, the applicant relied principally on *Rohana bte Ariffin & Anor v Universiti Sains Malaysia* [1989] 1 MLJ 487 and the following passages from the report referred to were: B

- (i) It is a well-established principle of administrative law that anything that restricts, or appears to restrict, the defendant's ability to present his case may be held to be a breach of procedural fairness and, thereby, susceptible to judicial review; for example, a defendant is generally entitled to notice of evidence that might assist his case. It is, therefore, a breach of natural justice for the prosecution to conceal such evidence: *R v Leyland Justice, ex p Hawthorn* (at p 493B–C (left)). C D

- (ii) Natural justice is but fairness writ large and juridically. It has been described as fairplay in action (p 495D (right)); and

- (iii) I must next turn to consider another ground relied upon by the applicants as showing a lack of fairness on the part of the disciplinary authority and this is it was reflected in the procedure it adopted in the examination of certain student witnesses whose testimony was most material to charges 3, 4 and 5 which the applicant Hashim faced (p 496B (left)). E F

[8] The court agrees wholly with the principles propounded in the case of *Rohana bte Ariffin*. The point is whether on the factual matrix of this instant case, there has been any breach of procedural fairness in the manner contended by the applicant. G

- 8.1 It is not disputed from the award of the learned chairman, that after evaluating the evidence of particularly COW 1 and COW 2, she considered Curtis Landry to be a material witness 'who could have shed some light on the real reason for the claimant's termination'. It is also not disputed the first hearing dates were 27 till 29 May 2003. Then on 6 May 2003 (case management) Mr Thavalingam informed the court that he had difficulty in recording witness statements as witnesses were from Singapore and Canada but requested for the hearing dates to be maintained for purposes of an amicable settlement. Vide letter dated 20 May 2003 to the Industrial Court (exh RG-6, p 77 encl 3), the applicant's solicitor sought the first adjournment due to the SARS outbreak and requested 27 May 2003 to be treated as a mention date and thus on the even date, the court fixed the new hearing dates on 1–3 December 2003 and 10 November 2003 as mention date. On H I

- A 10 November 2003 Mr Thavalingam informed the court that one of their witnesses, Curtis Landry could not attend court as he was based in Canada and *prayed for his evidence to be recorded later*. Mr Teh Hong Jet, learned counsel for the first respondent ‘objected vehemently’
- B stating ‘case has been fixed since May 2003. The witness should have known about this. Unfair for the claimant to wait/come back again as he too is based overseas in Thailand. Justice delayed is justice denied’. The learned chairman ruled *in no uncertain terms* that she wanted the hearing to proceed and to be completed during the allocated hearing dates (p 8 NOP, encl 11):
- C Application denied.
Case to proceed and to be completed.
To 1–3 December 2003 (Hearing).
- D 8.2 It was pointed out by Mr Thavalingam that they did not seek adjournment but proceeded with the hearing and four witnesses were called by the applicant. However on 3 December 2003 after the COW 4 had testified, Mr Thavalingam applied for
- E adjournment ‘to call Curtis Landry’ and stated ‘On this occasion [Curtis Landry] could not come because of unforeseen circumstances’. The learned chairman ruled p 54 NOP, encl 3):
- We had stated that we would grant no further adjournments.
- F When Mr Teh answered in the affirmative, she ruled (p 55 NOP, encl 3):
Can Claimant complete his evidence today?
- G Adjournment not allowed.
- H 8.3 Mr Teh submitted that the applicant gave ‘[N]o reason nor was there any letter from the said witness to explain why he could not attend court [on 10 November 2003]’. I agree partially with Mr Teh in that there is no letter from Curtis Landry explaining why he could not attend during the session from 1–3 December 2003 but I find the reason was given orally by Mr Thavalingam that Curtis Landry could not attend court as he was based in Canada.
- I 8.4 In submitting that the refusal to allow any adjournment showed a lack of fairness on the part of the Industrial Court and that it restricted the applicant’s ability to present its case which was tantamount to a breach of procedural fairness, Mr Thavalingam had orally submitted ‘It is not that we took the court by surprise, indicated at case management on 10 November 2003. Court could

have said that if your witness cannot come, can come another day'.
With regret I find this submission misconceived. A

8.5 I find the learned chairman's conduct on 3 December 2003 was consistent with her stand taken on 10 November 2003 (case management) when she disallowed Mr Thavalingam's request for Curtis Landry to be called later and she wanted the case to be 'proceed and to be completed' during the session of 1–3 December 2003. As I have alluded to earlier the learned chairman had expressly voiced her stand in refusing the applicant's request to have Curtis Landry's evidence recorded on a later date (and not 1–3 December 2003). B C

8.6 In my view as early as 10 November 2003 the applicant and applicant's counsel had due notice from the court as to its position vis-a-vis their application to have the testimony of Curtis Landry whom they knew to be a crucial witness recorded on a later date; so I do not see why they were again seeking an adjournment from the court on 3 December 2003, this time for the reason 'because of unforeseeable circumstances'. Subject to what I said regarding the oral application for adjournment made by learned counsel for the applicant for the reason that Curtis Landry was based in Canada, I wholly agree with Mr Teh that it is indeed baffling why having known the mind of the learned chairman as at 10 November 2003, and if the applicant had a valid and genuine reason for Curtis Landry not being able to come to court on 3 December 2003 and they intended to seek a postponement, they should have applied by letter to court well in advance ie as early as after 10 November 2003 and not on 3 December 2003 itself. D E F

8.7 Having regard to the facts of the case, I find that the learned chairman has acted fairly because as submitted by Mr Teh equity and good conscience must apply to both parties and in this regard in addition to what I have alluded to before this, on 10 November 2003 learned counsel for the applicant had due notice that the respondent had objected vehemently to his application for the evidence of Curtis Landry be heard on a later date. G H

[9] For the reasons given, I was of the view that the grounds upon which the second ground of challenge was premised on cannot be sustained and the Industrial Court has not erred in law or acted in excess of its jurisdiction. I

[10] At the outset of the hearing Mr Thavalingam informed the court that if he succeeded on the first ground of challenge, the second ground of challenge did not arise. Thus since I have found that the first ground is

- A** without merit, I shall now move on to the second ground of challenge which is against the portion of the award at p 29 (at p 518 of the Rosli's affidavit):

B The claimant's employment contract COE 1 was for a period of five years. It commences on 1 August 1999 and would have terminated on 31 July 2004. Since the claimant was terminated on 11 May 2001, there would have been 38 months remaining on his contract. And since the claimant's was paid 4 months salary as part of his compensation package, the court will deduct four months out of the 38 months remaining on his contract. Thus 38 – 4 months = 34 months.

C 10.1 In essence it is the applicant's contention that the first respondent was only entitled to be paid backwages from the termination of his contract till the expiry of his work permit. Hence the learned chairman had erred in law and in excess of jurisdiction when (pp 9–10 of applicant's outline submission):

D (a) it failed to take into account the relevant factor that the first respondent is an expatriate and that his services in Malaysia is subject to a valid work permit to be issued by the Malaysian Immigration Department.

E (b) it failed to take into account the relevant factor that the Industrial Relations Act 1967 is not applicable to the first respondent after his valid work permit expired on 26 September 2001.

F (c) it failed to take into account the provisions of the Employment (Restriction) Act 1968 (Revised 1988) Act 353 which stated that a person who is not a Malaysian citizen cannot be employed to work in Malaysia unless such person is in possession of a valid work permit.

G (d) it failed to take into account the relevant factor that the applicant had paid the first respondent all contractual dues as stated under the employment contract until his valid work permit expired on 26 September 2001 and therefore failed to limit his backwages to the expiry date of the valid work permit which is 26 September 2001.

H (e) it held that the first respondent is entitled to receive backwages from the period of 11 May 2001 to 31 July 2004, even though the first respondent was an expatriate and was unable to work legally in Malaysia after his valid work permit expired on 26 September 2001.

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- (f) it held that the first respondent was entitled to receive backwages from the period of 11 May 2001 to 31 July 2004 as such a decision was reflective that the first respondent has a valid work permit until 31 July 2004. A
- (g) in reaching such a decision that the first respondent was entitled to receive backwages from the period of 11 May 2001 to 31 July 2004, it acted in excess of its jurisdiction and assumed the special powers of the Malaysian Immigration Department to extend the validity of the first respondent's work permit from 26 September 2001 to 31 July 2004. B C
- (h) it failed to take into account the fact that the first respondent did not provide any evidence to show that the validity of his work permit would have been extended from 26 September 2001 to 31 July 2004. D

10.2 The first respondent opposed arguing that it was never the established principle that an expatriate whose services were unlawfully or unfairly terminated is only entitled to backwages up to the expiry of his work permit. E

[11] It can be seen that essentially the applicant's bone of contention revolved on the issue of work permit and in this instant case the work permit of the first respondent was shown to have expired 26 September 2001; thus backwages should not be awarded beyond that cut-off date. I am persuaded by the arguments canvassed on behalf of the first respondent and the cases cited in support thereof. Learned counsel for the first respondent submitted that there is a consistent trend of cases which decided that an expatriate who has been unfairly dismissed was awarded backwages for the unexpired period of his fixed term contract. I agree that these are the positions taken in *United Engineers (Malaysia) Bhd v Jurgen HH Dorbecker* [1993] 2 ILR 48; *Shahpadu Energy & Engineering SB v Stuart Ashley Eban* [1999] 1 LNS 196; *Man Yau Holdings Bhd v Pakirisamy Karunakaran* [2003] 2 ILR 16; *Microsoft Malaysia Sdn Bhd v Michael Brian Davis* [2002] 2 ILR 453; *Tyco Engineering & Construction (M) Sdn Bhd v James Francis Trimble & Anor* [2005] 7 MLJ 631 (HC); *Stamford College v Leslie Dolores Swanson* [1997] 1 ILR 152. F G H

11.1 In *Microsoft Malaysia*, the claimant was a non-citizen and the issue before the Industrial Court was whether reinstatement should be ordered and if reinstatement is not appropriate, the appropriate compensation payable (by way of certiorari proceedings the claimant was held to be unjustly dismissed). In support of his submission that the Industrial Court is not impeded from awarding reinstatement to a foreigner, counsel for the claimant referred to the *Assunta Hospital v Dr A Dutt* [1981] 1 MLJ 115 where from the judgment at p 116B–D (left) I

- A the Federal Court held that an expatriate ought to be afforded the remedy of reinstatement and the issue of work-permit is not a matter that can influence the court in the proper exercise of the jurisdiction conferred on it by the minister's reference of the representations for reinstatement. As pointed out by Mr Teh if reinstatement was awarded
- B it would entail payment of backwages from the date of dismissal till date of reinstatement which would far exceed the amount of backwages payable to the expatriate who is normally engaged on a fixed term contract. Thus, in this present case, I agree that flowing from the principle propounded in *Dr A Dutt's* case, surely it is only logical and
- C reasonable that the first respondent be awarded backwages for the remainder of the unexpired period of his fixed term contract which was exactly what the learned chairman did. Hence, I find there is no error of law or acting in excess of jurisdiction.
- D 11.2 In addition the learned chairman in the present case held reinstatement was inappropriate because the first respondent since his termination found fresh employment and based on evidence from the applicant, there was such no position of Director of Marketing and Sales (p 28 of award/p 517 of Rosli's affidavit); thus it is apparent that the order of
- E reinstatement is not an issue linked to work permit. Furthermore following *Dr A Dutt's* case, whether first respondent had a valid work permit or not is irrelevant.
- F 11.3 With respect, I also find the applicant's argument on the failure of the learned chairman to take into account ss 5, 6, and 7 of the Employment (Restriction) Act 1968 (Revised 1988) (Act 353) cannot hold water. The reason is the issue in the Industrial Court is whether the first respondent's dismissal was with just cause or excuse; and if the court finds it to be in the affirmative, the first respondent ought to be awarded
- G the remedy irrespective of whether he was still holding a valid work permit.
- H 11.4 Learned counsel for the first respondent submitted that the determination of quantum of backwages is at the discretion of the Industrial Court and he cited *Matrix Fire System Sdn Bhd v Aziman Shah bin Abdul Samad* [1999] 6 MLJ 230. In this case the Industrial Court found the respondent to be unjustly dismissed after working as a probationary project executive with the applicant for two weeks; the respondent applied for an order of certiorari to quash the award, inter alia, on the ground that the compensation sum of RM26,000 was
- I excessive and unreasonable. On this point, in refusing to interfere with the Industrial Court's decision, Nik Hashim J (now FCJ) at p 237 held 'Since there is legal basis for paying compensation, the question of quantum is very much a matter of discretion of the learned chairman to fix under s 30 of the Act'.

A similar view was adopted by Azmel J (as he then was) in *Shapadu Energy & Engineering SB* and I agree with the views so expressed.

[12] Thus for the reasons given I also found the grounds mounted in respect of the second ground of challenge cannot be sustained. In conclusion, I am of the view that the Industrial Court has not erred in law or acted in excess of its jurisdiction. Accordingly, the applicant's application is dismissed with costs.

Application dismissed with costs.

Reported by K Nesan

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